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No. 00-276

IN THE

Supreme Court of the United States

United States of America and
United States Department of Agriculture,

Petitioners,

v.

United Foods, Inc.,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Bradley A. MacLean
Farris, Warfield & Kanaday, PLC
Suntrust Center
424 Church St.
Suite 1800
Nashville, TN 37219-2376

Laurence H. Tribe
(Counsel of Record)
Hauser Hall 420
1575 Massachusetts Ave.
Cambridge, MA 02138
(617) 495-4621

Thomas C. Goldstein
Thomas C. Goldstein, P.C.
4607 Asbury Pl., N.W.
Washington, DC 20016

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RULE 29.6 STATEMENT

Pictsweet, L.L.C. is the parent corporation of Respondent United Foods, Inc. No other company owns 10% or more of Respondent's stock.

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RESPONDENT'S BRIEF IN OPPOSITION

The Sixth Circuit in this case resolved an exceedingly narrow question limited to only part of a government program that itself applies to a single, unique industry: may the government by regulation exact a financial assessment from mushroom producers and importers to be used for generic advertising of mushrooms? The Sixth Circuit's holding that the assessment is invalid because it is not germane to any government effort at regulating the stable and free market for mushrooms follows directly from this Court's recent decision in *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997). No other court (whether state or federal, trial or appellate) has even *considered* the same question, much less reached a contrary holding. Nor does the decision below invalidate an Act of Congress. This case furthermore would be an exceedingly poor vehicle to resolve any broader issues regarding the constitutionality of compelled advertising programs because there is no substantial factual record in this case that would permit a full exploration of the nature of the markets for mushrooms and other commodities that are subject to similar advertising assessments. Certiorari accordingly should be denied.

1. Respondent United Foods grows and sells mushrooms. Headquartered in Tennessee, United Foods operates mushroom farms in Ventura, California (serving Southern California and Arizona); Salem, Oregon (serving the Pacific Northwest); and Fillmore, Utah (serving the Central Rocky Mountain States). The farms supply only local geographic markets because the low density of mushrooms makes shipping costly and because mushrooms spoil relatively soon after harvesting and are easily bruised in transit.

United Foods' marketing strategy is to differentiate its mushrooms and its service to retailers as superior to that provided by its competition. Because United Foods competes with only a small number of suppliers in each self-contained

local market, its marketing efforts are local, rather than national. In its local markets, United Foods promotes its "Pictsweet" brand name and expends considerable amounts of money, generally in coordination with retailers, to encourage purchasing of United Foods mushrooms as opposed to other brands. For example, with certain specific grocers, United Foods assists in shelf-space planning, subsidizes newspaper advertising, provides point-of-sale promotions, and conducts in-store demonstrations and tastings. It is essential that marketing efforts be targeted in this fashion because mushrooms are perceived by the public as a discretionary, gourmet item and therefore are attractive only to certain consumers.

The mushroom industry is characterized by vigorous competition, extraordinary stability, and elasticity of supply. *E.g.*, Jim Offner, *Mushrooms: Record Year Raïses Hopes For Future*, THE PACKER, Sept. 11, 2000, at A2 (reporting view of the President of the Mushroom Council that the market is typified by "a stable price, with increasing supplies"). Mushroom farms are unique facilities, entirely insulated from the weather in warehouse-like buildings, in which factors such as temperature, humidity, and carbon dioxide levels are closely controlled within "growing rooms" to maintain optimal conditions during the sixty- to ninety-day growing cycle. See U.S. Dep't of Agric., *An Economic Assessment of Mushrooms: Executive Summary* (undated) <<*www.act.fcic.usda.gov/pilots/feasible/txt/mushroom.txt*>> (visited Oct. 5, 2000) ("[V]irtually all commercial mushroom production occurs indoors, where it is largely isolated from naturally-occurring perils, such as unseasonable cold, moisture extremes, wind storms, and hail, which cause most yield losses among outdoor crops."). Thus, mushroom producers such as United Foods produce mushrooms 365 days per year and, at any given time, will have mushrooms at every stage of production. Because of the exceedingly short growing cycle for mushrooms and the flexibility afforded by the numerous growing rooms, mushroom growers can, with insignificant

marginal investment, quickly increase or decrease production in response to changing local market conditions.[1]

2. Given the absence of competitive barriers and the consistent stability of the market, the federal government has elected not to regulate the mushroom industry. Federal law does not regulate quality, packaging, advertising, pricing, or volume. Nor does the government have any programs to modulate demand or supply, whether by purchasing oversupply or otherwise.

Federal regulation instead touches upon mushrooms in only one way: the "Mushroom Order," only part of which is at issue in this case. Congress enacted the Mushroom Promotion, Research, and Consumer Information Act ("Mushroom Act") in 1990. Pub. L. No. 101-624, §§ 1921-1933 (Food, Agriculture, Conservation, and Trade Act of 1990, tit. XIX, subtit. B, 104 Stat. 3854-3865), *codified at* 7 U.S.C. §§ 6101-6112. In sum, the Act directs the Secretary of Agriculture to issue an Order providing for the formation of a "Mushroom Council" that will direct programs for "mushroom promotion, research, consumer information, and industry information." 7 U.S.C. § 6104(b); *id.* § 6104(c)(4). The Secretary promulgated the Order in 1993. See 7 C.F.R. Pt. 1209. Neither the Mushroom Act nor the Order was involved in *Wileman*.

---

[1]At two of United Foods' farms – in Ventura, California and Salem, Oregon – the facilities are divided into 90 growing rooms, each of which contains between 8000 and 10,000 square feet of mushroom "beds." Conditions within each growing room are adjusted as necessary to approximate optimal conditions as each room's crop of mushrooms progresses through the growing cycle. At United Foods' third farm, in Fillmore, Utah, conditions in each growing room are maintained at a constant level approximating optimal conditions for one particular stage of the growing cycle; mushrooms are then shifted from room to room in moveable trays as they progress through the cycle.

This case involves only the Council's method for funding its promotion and information programs, which involve such activities as advertising and public relations directed at the grocery trade and consumers. See 7 C.F.R. § 1209.17. The Mushroom Order provides that funding for the Council's programs and administrative costs – including the promotion of consumption of mushrooms – may be secured through a mandatory assessment on domestic production and importation of mushrooms. *Id.* § 1209.51. The assessment applies, however, only to producers and importers of more than 500,000 pounds of mushrooms annually for the "fresh" market. 7 U.S.C. § 6102(9), 7 C.F.R. §§ 1209.11, 1209.52. Funding also can be secured by voluntary contributions. 7 C.F.R. § 1209.50(d).

3. As a constitutional matter, United Foods opposes the Council's generic, nationwide approach to promoting mushrooms. The Council's "if you've seen one mushroom, you've seen them all" promotions undermine United Foods' effort to differentiate its Pictsweet brand from competitors, as well as its effort to tailor marketing to local retail conditions. United Foods' private ownership also objects to the Council's promotions, including efforts to associate mushrooms with consumption of alcohol and its decision to tout mushrooms as an aphrodisiac.

Furthermore, United Foods regards the Council's budget (on the order of one million dollars for promotions throughout the whole country, C.A. App. 311) as a waste of money: it is too small to increase mushroom consumption (particularly given that the industry is highly competitive and already contains substantial private advertising). The Council's nationwide generic advertising also fails to account for local conditions and the specific consumers likely to purchase mushrooms. Not surprisingly, the Council's advertising has produced no demonstrated effect on the marketplace. See Decision on Respondent's Motion for Reconsideration, *In re Donald B. Mills, Inc.*, MPRCIA Dkt. No. 95-1 (June 12,

1996), at 7-8 ("Because the evidence has not shown that the Mushroom Council was better able to promote and increase consumption of mushrooms than [private] producer-handlers, or to increase consumption at all, the Mushroom Promotion Council's program has not been shown to directly advance the government's interest in stimulating and expanding the mushroom industry."). Furthermore, because mushroom producers can easily increase or decrease production over the short term in response to changes in the market, a generic promotion program *cannot* increase mushroom prices by increasing mushroom demand; to the extent that any such program actually increased demand, producers, including particularly those not currently in the market for fresh mushrooms, could (and would) simply (and quickly) increase production.

United Foods therefore filed a petition with the Secretary of Agriculture, see 7 U.S.C. § 6106(a), seeking a determination that the Order's assessment to pay for mushroom promotions violates the First Amendment. The United States in turn filed suit in federal district court in Tennessee, see *id.* § 6107(a), seeking to compel United Foods to pay the assessment. Based on the government's objection, the administrative law judge rejected United Foods' request to have a developed record from a parallel administrative challenge to the mushroom assessment adopted in this case. Order Granting Motion To Stay Proceedings, No. 96-1252, *United States* v. *United Foods*, at 4 (W.D. Tenn. Feb. 11, 1997) ("Upon the filing of United Foods' administrative petition raising the same issues [as another administrative proceeding], the ALJ proposed that the parties agree to rely on the record in the Mills hearing. The Secretary objected, however, and requested a new hearing."). Without holding a hearing, the administrative law judge and a judicial officer of the Department of Agriculture subsequently rejected United Foods' claim, and Respondent sought review in the same district court. See 7 U.S.C. § 6106(b)(1).

The district court consolidated both actions and granted the government's motion for summary judgment. Pet. App. 20a. The court concluded that the Order's assessment for paid promotions was valid under this Court's decision in *Wileman*, which narrowly sustained marketing orders applicable to California tree fruits. Rejecting United Foods' argument that the mushroom assessment was unconstitutional under *Wileman* because the mushroom industry is entirely unregulated, the district court concluded that "[t]he *Wileman* decision did not turn on the degree to which [the] State or Federal Government has otherwise displaced free market competition." Pet. App. 18a (citation omitted).

4. On United Foods' appeal, the Sixth Circuit reversed. The court of appeals characterized the question before it as "whether the government is right that [the degree of regulation] is irrelevant under *Wileman*." Pet. App. 4a; see also *id.* 3a (describing the government's position that "the degree of regulation or 'collectivization' of an industry should make no First Amendment difference"). Devoting nearly the whole of its opinion to an analysis of *Wileman*, the Sixth Circuit "conclude[d] that the explanation for the *Wileman* decision is to be found in the fact that the California tree fruit industry is fully collectivized and is no longer a part of a free market, as well as in the nonpolitical nature of the compelled speech." *Id.* 7a. In particular,

> In the *Wileman* case, the Supreme Court emphasized and reemphasized that the compelled advertising program for California tree fruits under the Agricultural Marketing Agreement Act of 1937 contemplates "a uniform price to all producers in a particular market," a "policy of collective, rather than competitive, marketing" and an exemption from the antitrust laws in order "to avoid unreasonable fluctuation in supplies and prices." *Wileman*, 521 U.S. at 461, 117 S. Ct. 2130. In his opinion for five members of the Court, Justice Stevens repeatedly "stress[ed] the importance" of the fact

> that the advertising takes place "as a part of a broader collective enterprise in which [the producers'] freedom to act independently is already constrained by the regulatory scheme." *Id.* at 469, 117 S. Ct. 2130.

Pet. App. 4a-5a.

In this respect, the Sixth Circuit reasoned, compelled promotion programs are sustainable if they are part and parcel of a broader scheme of government regulation. "The purpose of this principle joining regulation and content is to deter free riders who take advantage of their monopoly power resulting from regulation of price and supply without paying for whatever commercial benefits such free riders receive at the hands of the government." Pet. App. 7a-8a. In other words, "If an economic actor chooses to remain aloof from the regulated industry, he owes no reciprocal duty to promote the industry; but if he chooses to join, he has a reciprocal duty to promote its interest." *Id.* 8a. The court of appeals therefore concluded that *Wileman* insulates from First Amendment challenge compelled promotion schemes that are "'germane to the purposes'" of market regulation, *id.* 6a (quoting *Wileman*, 521 U.S. at 473), or that present "some other compelling justification," *id.* 7a.

Applying that analysis, the Sixth Circuit found that the mushroom assessment failed to pass muster under *Wileman* because "the mushroom business is entirely different from the collectivized California tree fruit business. Mushrooms are unregulated." Pet. App. 8a. "[T]he mushroom market has not been collectivized, exempted from antitrust laws, subjected to a uniform price, or otherwise subsidized through price supports or restrictions on supply." *Id.* 5a. Indeed, "[t]he Act *does not permit* the regulation of prices or mandatory quantity or quality controls of mushrooms produced and sold by farmers, nor does it subsidize or restrict the growth of mushrooms or otherwise collectivize the industry." *Id.* 2a n.1 (citing 7 C.F.R. § 1209.40(a) ("[N]othing in this subpart [*i.e.*, the Mushroom Order] may be construed to authorize mandatory

requirements for quality control, grade standards, supply management programs, or other programs that would control production or otherwise limit the right of individual producers to produce mushrooms.")).

ARGUMENT

None of the four bases asserted by Petitioner for granting certiorari is persuasive. The Sixth Circuit's holding is entirely faithful to, and indeed is compelled by, this Court's decision in *Wileman*. No other court of appeals has reached a contrary result. Indeed, no other court has ever considered the question presented by this case; the decisions invoked by Petitioner involve not mushrooms but instead the beef industry, which is easily distinguishable on several independent grounds. Nor does the decision below interfere with the orderly administration of other government assessment and advertising programs. Finally, review is unwarranted because the part of the Mushroom Order invalidated by the Sixth Circuit is terminable at will either by the Secretary of Agriculture or by participants in the market. The Sixth Circuit thus did not invalidate an Act of Congress, but only an administrative order of temporary (and potentially quite limited) duration. Certiorari therefore should be denied.

I. The Ruling Below Does Not Conflict With This Court's Decision In *Wileman*.

1. Relying on this Court's decision in *Wileman*, the Sixth Circuit correctly rejected Petitioner's claim that the degree of regulation is "irrelevant" and "make[s] no First Amendment difference" in evaluating a program of compelled commodity promotion. Pet. App. 3a-4a. Petitioner now maintains that *Wileman* "did not * * * center on the extent to which those industries were regulated," because the Court's discussion of the degree of regulation "was in Part III of the Court's opinion" while "[t]he Court's First Amendment analysis, on the other hand, was set forth in Part IV of the Court's opinion." Pet. 10. That is not correct. The majority opinion in *Wileman*

repeatedly emphasized the comprehensive nature of regulations governing the tree fruit industry and marketplace. See 521 U.S. at 461 (opinion Part I; describing "the policy of collective * * * marketing"); *id.* at 474 (opinion Part IV; noting that some tree fruit producers "may well object to the marketing orders * * * because they might earn more money in an unregulated market"); *id.* at 474 (opinion Part IV; noting "other features of the regulatory orders that impose restraints on competition that arguably disadvantage particular producers for the benefit of the entire market"); *id.* (opinion Part V; noting "the collective action program at issue here"); *id.* at 475 (opinion Part V; "The basic policy decision that underlies the entire statute rests on an assumption that in the volatile markets for agricultural commodities the public will be best served by compelling cooperation among producers in making economic decisions that would be made independently in a free market."); *id.* at 476 (opinion Part V; "Generic advertising is intended to stimulate consumer demand for an agricultural product in a regulated market. That purpose is legitimate and consistent with the regulatory goals of the overall statutory scheme.").

Most telling is the *Wileman* majority's introduction to its First Amendment analysis, which is so clear that no degree of parsing by Petitioner can draw significance from the fact that it appears immediately before rather than immediately after heading "IV" in the opinion:

> *The legal question that we address* is whether being compelled to fund this advertising raises a First Amendment issue for us to resolve, or rather is simply a question of economic policy for Congress and the Executive to resolve.
>
> *In answering this question we stress* the importance of the statutory context in which it arises. California nectarines and peaches are marketed pursuant to detailed marketing orders that have displaced many aspects of independent business activity that characterize

> other portions of the economy in which competition is fully protected by the antitrust laws. The business entities that are compelled to fund the generic advertising at issue in this litigation do so as a part of a broader collective enterprise in which their freedom to act independently is already constrained by the regulatory scheme. *It is in this context* that we consider whether we should review the assessments used to fund collective advertising, together with other collective activities, under the standard appropriate for the review of economic regulation or under a heightened standard appropriate for the review of First Amendment issues.

521 U.S. at 469 (emphases added). Petitioner back-handedly admits that, "[t]o be sure, the Court did 'stress the importance'" of the regulatory context of the tree fruit programs, Pet. 10 (quoting 521 U.S. at 469), but then totally fails to explain why, on its reading of *Wileman*, the majority *did* "stress" the issue.[2]

Not only is Petitioner's position irreconcilable with *Wileman*, but it would also go far beyond any of this Court's compelled speech precedents and permit the government to compel private parties to finance *any* commercial message of the government's choosing. The only limit acknowledged by Petitioner is that the assessment must be germane to a promotion

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[2] Thus petitioner is flatly wrong in stating that "[p]resumably, if the Court had intended its decision in *Wileman Brothers* to turn on the extent of regulation of the industry at issue, the Court would not merely have stated as a fact that the California tree fruit industry was extensively regulated, but would also have explained the significance of such a fact to its First Amendment analysis." Pet. 10. It is difficult to understand what more Petitioner would require than this Court's precise statement of "[t]he legal question we address" followed immediately by the admonition that "[i]n answering this question we stress the importance" of the regulated nature of the tree fruit industry.

program. But that of course is no limit at all because it is completely tautological: it is the *assessment* that funds the very promotion program to which it is said to be germane. Nothing short of the Sixth Circuit's understanding that compelled advertising is constitutional only when germane to a broader regulatory program in order to prevent free riding by market participants makes sense of this Court's decision in *Wileman* and prevents a gross expansion of the government's ability to compel private speech. See Pet. App. 7a-8a.

2. Petitioner offers the further theory, which can only be described as convoluted in the extreme, that *Wileman* cannot rest on the regulated nature of commodity markets because the Court in that case granted certiorari to resolve a conflict between the Ninth Circuit's decision invalidating the tree fruit program and the Third Circuit's decision in *United States* v. *Frame*, 885 F.2d 1119 (1989), *cert. denied*, 493 U.S. 1094 (1990), sustaining a program for beef. Pet. 10-11. Asserting that the beef market is not regulated, Petitioner contends that the Court could not have relied on regulation in the tree fruit industry because "the circuit conflict that the Court identified * * * would not have been resolved." Pet. 11.

Petitioner's argument is a *non sequitur*: the Court not infrequently grants certiorari to resolve a circuit conflict but ultimately rules on some other basis. In particular, it was Petitioner itself that repeatedly argued in *Wileman* that the tree fruit advertising programs should be sustained on the ground that they furthered the government's efforts to stabilize the market through regulation. Petitioner explained that the "programs [were] undeniably 'germane' to the statutory purposes of establishing stable agricultural market conditions and expanding the market for the covered commodities by increasing consumption of those commodities," Br. for United States, No. 95-1184 (hereinafter "Petr's *Wileman* Opening Br.") 15, and specifically "were intended to address the devastating effects of depressed consumption and unstable market forces that prevailed at the time of their enactment,"

id. 26. See also *id.* 16 (first sentence of argument section explaining that tree fruit marketing orders were designed, *inter alia*, "to stabilize the market for California nectarines, peaches and plums"). Describing as "incorrect" the plaintiffs' position that the tree fruit program was nothing more than compelled speech, Petitioner in its reply brief aptly summarized its position as follows:

> The regulatory framework established by the Act and the Secretary's marketing orders has the nonspeech-related purpose of establishing stable and orderly marketing conditions and enhancing returns to growers. See Gov't Br. 3, 26, 35. The Act and its enabling regulations establish *an array of mechanisms* designed to achieve that end, including minimum quality and maturity standards, grading and inspection requirements, production research, marketing research, and development projects. 7 U.S.C. 602(3). The generic advertising activities that are at issue here are *but one element* of the 'marketing research and development projects' authorized by Congress, 7 U.S.C. 608c(6)(I), and are part of a *far broader regulatory system* that does not principally concern speech.

Reply Br. of the U.S., No. 95-1184, at 3-4 (emphases added); see also *id.* 4-5 (tree fruit advertising "is part of a larger regulatory framework that does not principally concern speech").

Petitioner went still further at oral argument, conceding that, were it not for the interest in "regulating these commodities and establishing orderly market conditions," "then the Government *would lose in this case*." Oral Arg. Trans., No. 95-1184 (hereinafter "*Wileman* Arg. Trans.") 13 (emphasis added); see also *id.* 6 ("The Agricultural Marketing Agreement Act expressly sets out the goals of that statute and of the marketing orders, which include establishing orderly market conditions for the covered commodities."); *id.* 7 (agreeing, in response to question from Justice Souter, that

failure to impose assessment *even on tree fruits* in other areas of the country was explicable because "there simply has not been a demonstrated instability in markets elsewhere"). Moreover, Petitioner addressed the beef program and the Third Circuit's *Frame* decision in precisely those terms. When Justice Ginsburg raised *Frame* at oral argument, Petitioner described the unstable state of the beef and tree fruit markets as "quite similar" but the regulatory programs as "somewhat different" because "[t]he beef program focuses almost exclusively on promotional programs and advertising." *Wileman* Arg. Trans. 26.

Because the Sixth Circuit correctly recognized that *Wileman* turned on the regulated nature of the tree fruit industry, there is no occasion for certiorari review.

II. The Ruling Below Does Not Conflict With Any Decision Of Another Circuit.

Petitioner's argument that the Sixth Circuit's decision invalidating the mandatory assessment for generic mushroom promotion creates a circuit conflict is strained indeed, given that no other federal or state court has *ever* even considered the constitutionality of that program. Petitioner instead must rely on a severe overreading of the breadth of the decision below. The Sixth Circuit's decision is limited by its plain terms, leaving open the question whether other commodity promotion programs would be sustained under the First Amendment. The court in this case went no further than to reject Petitioner's argument that the degree of regulation is "irrelevant" and "make[s] no First Amendment difference." Pet. App. 3a-4a. Indeed, the Sixth Circuit expressly concluded that alternative programs would be sustained if they presented "some other compelling justification not present in the case before us." *Id.* 7a. It was only because mushrooms are entirely unregulated that the Court concluded that the

promotion assessment in this case was not germane to any broader effort to stabilize the market. *Id.* 7a-9a.[3]

Petitioner's only stab at asserting a circuit conflict – its argument that the decision below conflicts with two decisions sustaining the assessment for beef, see 7 U.S.C. §§ 2901-11 – misses the mark for several reasons. First, assuming for the moment that the beef and mushroom programs are analogous and both industries are unregulated, no conflict exists because neither case cited by Petitioner addresses the question of what result *Wileman* compels for unregulated commodities. The Third Circuit's decision in *Frame*, in fact, is entirely irrelevant because it predates *Wileman*. Petitioner's description of the other case, *Goetz* v. *Glickman*, 149 F.3d 1131 (CA10 1998), *cert. denied*, 525 U.S. 1102 (1999), is not correct. Petitioner quotes a single sentence in the *Goetz* plaintiff's brief and then quotes the Third Circuit's decision that the plaintiff's "'First Amendment claim is fruitless.'" Pet. 11-12 (quoting 149 F.3d at 1139). In reality, the Third Circuit in *Goetz* addressed only a distinct First Amendment claim, as the opinion makes clear when read in context: "First Amendment. Goetz also asserts the assessment violates his First Amendment right because he is compelled to support advertising which promotes beef consumption. Goetz argues the Act singles out and unfairly burdens producers, importers and persons who must collect the tax (buyers of beef)." 149 F.3d at 1138. The Tenth Circuit's summary rejection of the plaintiffs' claim that the beef assessment "singles out and unfairly burdens" certain market participants is distinguishable from

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[3] Of note, the Sixth Circuit has by unpublished opinion sustained the assessment for milk, reasoning that *Wileman* insulates from constitutional challenges promotion programs for industries subject to government regulation, even if they "may not be as regulated as the produce industry at issue in [*Wileman*]." *Nature's Dairy* v. *Glickman*, No. 98-1073, 1999 U.S. App. LEXIS 3547, at *10 (Mar. 2, 1999), *cert. denied*, 120 S. Ct. 786 (2000).

and, indeed, is unrelated to the Sixth Circuit's holding in this case.

Second, the *Frame* and *Goetz* decisions are distinguishable because the market for beef is less stable and (in part for that reason) more heavily regulated than the market for mushrooms. The Third Circuit explained in *Frame* that the assessment for beef rests on the government's interest in

> preventing further decay of an already deteriorating beef industry. * * * Widespread losses and severe drops in the value of inventory have driven many cattlemen to bankruptcy, as well as to the abandonment of ranching altogether. A continuation of this trend would endanger not only the country's meat supply, but the entire economy.

885 F.2d at 1134 (citing Committee Report, Beef Research and Information Act, H.R. Rep. No. 452, 94th Cong., 1st Sess. 2-3 (1975); 121 Cong. Rec. H31439 (1975) (remarks of Rep. Santini); H.R. Rep. No. 271, 99th Cong., 1st Sess. 2 (1985), *reprinted in* 1985 U.S.C.C.A.N. 1103, 1111); see also Bill Hord, *USDA May Spur Cattle Price Hike*, OMAHA WORLD-HERALD, Mar. 25, 1998, at 1 (quoting Sen. Tom Harkin, who described "serious economic hardships threatening the survival of livestock producers").

Among other things, the market for beef is significantly less stable and elastic than the mushroom market because beef production involves substantially longer growth cycles. Beef cattle, which are generally slaughtered between fifteen months and two years after birth, are raised in herds, which can only be expanded at a limited rate per year. See Terence P. Stewart et al., *Trade and Cattle: How the System Is Failing An Industry in Crisis*, 9 MINN. J. GLOBAL TRADE 449, 460 (2000) ("The cattle cycle reflects the limited ability of cattle producers to respond to changes in market conditions because of the time required to raise the cattle until they are ready for sale to the packing houses. * * * [C]ow-calf operators expand

or liquidate their herds based on the market conditions they believe will prevail in two or three years."). For beef producers, profitability is a function of total supply and grain prices and cannot be modified in the short term. Thus, in contrast to the mushroom market, generic promotion campaigns may be more effective for the beef industry (and the tree fruit industry at issue in *Wileman*) because of the length of its growing cycles and its inability to respond to short-term changes in the market; to the extent that such campaigns increase beef consumption, prices will rise as a result of demand-pull inflation because the supply of beef is relatively fixed in the short term.[4]

The federal government specifically has adopted a number of market stabilization measures for the beef market that

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[4] Both the beef and tree fruit industries are uniquely susceptible to economic forces that make those markets far less stable than mushrooms. For beef, the principal factor leading to market instability is the zero-sum relationship between fed and breed cattle. When beef is in oversupply and prices are low, it is not economical for ranchers to breed cattle to increase future supplies. Cattle therefore are slaughtered at greater rates, ironically increasing supplies and further suppressing prices. When beef is in undersupply and prices are low, the economic incentive is to use female cattle for breeding, further tightening supplies. It may take a substantial extrinsic shock, such as a change in feed costs or interest rates, to correct the market by sending prices in the opposite direction.

For tree fruit, the principal factors are the long lead time from planting until maturity and the large capital commitment incurred at the time of planting. Growers respond to higher prices by enlarging their orchards. By the time new plantings are at full production (typically seven years), considerably more trees may have been planted than the market can support. In times of substantial oversupply, which are sustained because growers continue producing because most of their costs already have been sunk, prices may fall for considerable periods.

do not exist in the mushroom industry. For example, the Packers and Stockyards Act of 1921, Pub. L. No. 100-173, 101 Stat. 917, *codified at* 7 U.S.C. §§ 181-231, and its accompanying regulations, 9 C.F.R. § 201.1 et seq., were enacted to ensure competitive conditions in the beef market and to prohibit unfair and deceptive practices in the procurement of livestock. *E.g.*, Douglas J. O'Brien, Note, *The Packers & Stockyards Act of 1921 Applied to the Hog Industry of 1995*, 20 IOWA J. CORP. L. 651, 652-53 (1995) ("The Act attempts to assure fair trade practices in the livestock marketing and meat packing industries in order to safeguard farmers against receiving less than true market value for their livestock, and to protect consumers from unfair marketing of meat. When Congress passed the Act, it was described as '*a most comprehensive measure, extending farther than any previous law in the regulation of private business*, in time of peace, except possibly in the Interstate Commerce Act.'" (emphasis added) (citation omitted)). Thus, the Packers and Stockyards regulations prohibit meat packers from owning or operating market agencies, see 9 C.F.R. § 201.67, and limit the extent to which a market agency can enter into agreements or relationships with dealers or other buyers, *id.* § 201.61, or purchase livestock consigned to it, *id.* § 201.56. The regulations also limit the exchange of information (including the prices to be paid and the volume to be purchased) among buyers prior to or during the course of purchases, *id.* § 201.69; require all market agencies and dealers to register with the USDA, *id.* § 201.10; and provide extensive detail regarding the scales used to weigh livestock for sales, including the frequency with which scales are to be tested, *id.* § 201.72, and instructions for weighing livestock, *id.* § 201.73-1.

Congress has further sought to foster competitive market conditions in the beef industry through the passage of the Livestock Mandatory Reporting Act of 1999, Pub. L. No. 106-78, 113 Stat. 1188, *codified at* 7 U.S.C. §§ 1635-1636h, which requires large livestock packers and processors to provide USDA with sales and pricing information, and which is

itself an intervening development that could substantially affect the courts of appeals' analysis of the constitutionality of the beef program. The mandatory reporting requirement, which represents a change from the USDA's earlier voluntary reporting process, was deemed necessary in light of the industry's increased concentration and the prevalence of private marketing arrangements, in which prices and terms of sale were not disclosed. See U.S. Dep't of Agric., *Livestock Mandatory Reporting Program: Background <<http://www.ams.usda.gov/lsg/mpr/mprbackground.htm>>* (visited Sept. 29, 2000). Of note, Petitioner USDA heralded the mandatory price reporting requirement as "a move to help level the playing field" and emphasized that the program "will help producers by making the market more transparent, giving them better information about what's happening in the marketplace." U.S. Dep't of Agric., *Glickman Announces Mandatory Livestock Price Reporting* (Mar. 14, 2000) (press release) *<<www.usda.gov/ news/releases/2000/03/0081.htm>>* (visited Sept. 29, 2000).

The USDA has also implemented a commodity purchase program pursuant to which the government buys beef for use in federal food programs such as the school lunch program. Petitioner itself has emphasized that such programs "assist[] farmers, commodity producers, and processors by helping maintain stable commodity prices." U.S. Dep't of Agric., Agricultural Mktg. Serv., *Commodity Purchase Programs <<www.ams.usda.gov/lsg/ls-cp.htm>>* (visited Sept. 27, 2000); Hord, *supra* (announcement of additional government purchase of beef to "help offset a surplus supply of fed cattle that is depressing prices to ranchers, farmers and feedlot operators").

Also unlike mushroom producers, the beef industry is subject to numerous federal health and safety requirements that eliminate differentiation based on varying levels of safety, sanitation, and quality, thereby making beef effectively a fungible commodity. The president of the American

Meat Institute has thus described meat and poultry manufacturers as "the most intensely regulated segment of the U.S. food industry." James H. Hodges, *Meat and Poultry Regulatory Update*, 54 Food Drug L.J. 459, 460 (1999). For decades, USDA employees have inspected every carcass (137.5 million head of livestock in 1996 alone) that moves through slaughterhouses and processing plants, see Edward Walsh, *USDA Shift Puts Safety in Packers' Hands; Meat Inspectors Fight to Keep Role*, WASH. POST, Oct. 20, 1998, at A17, and – as of 1998 – had nearly eight thousand inspectors posted in more than six thousand slaughterhouses or processing plants in the United States and its territories. See U.S. Dep't of Agric., *1998 Agriculture Fact Book*, ch. 9. More recently, the USDA has promulgated new regulations, known as the Hazard Analysis and Critical Control Point Systems, that require each meat or poultry producer to implement a plan to identify and reduce the risk of bacterial contamination in slaughterhouses and processing plants. See 9 C.F.R. Pt. 304. Under the new regulations, USDA inspectors monitor compliance with the plans and test samples for contamination. *Id.*

Further, the Mushroom Order itself differs from the parallel beef regulation in two critical respects. First, the Mushroom Act expressly states that it shall not be construed "to provide for the control of production or otherwise limit the right of individual producers to produce mushrooms," 7 U.S.C. § 6101(c), and the Secretary of Agriculture has provided that the Mushroom Order shall not be construed to authorize "mandatory requirements for quality control, grade standards, supply management programs, or other programs that would control production," 7 C.F.R. § 1209.40(a)(2). The provision for beef contains a far more limited statement that the statute will not be "construed to limit the right of individual producers to raise cattle," 7 U.S.C. § 2901(b), and, as noted, the federal government is heavily involved in regulating beef production.

Third, assessments are imposed under the Mushroom Order only upon persons who produce or import more than 500,000 pounds of mushrooms annually, 7 C.F.R. § 1209.52(a), for sales in the fresh market, see 7 U.S.C. § 6102(9) (excluding "mushrooms that are commercially marinated, canned, frozen, cooked, blanched, dried, packaged in brine, or otherwise processed" from definition of "mushroom" for purposes of the Mushroom Act). The Sixth Circuit was therefore correct to hold in this case that the mushroom assessment could not be sustained on the ground that it prevents market participants from "free riding" on other mushroom advertising, Pet. App. 8a, given that the Order itself exempts a very large number of producers and importers from paying based on the volume of their production or imports or the end uses of their mushrooms.[5] The beef assessment, by contrast, applies to *all* sales of cattle, such that there is a much more substantial argument that the assessment is a valid effort to prevent free riding. See U.S. Dep't of Agric., Agricultural Mktg. Serv., *Beef Promotion and Research Order* <<*www.ams.usda.gov/lsg/mpb/beef/beefchk.htm*>> (visited Sept. 27, 2000) ("All producers owning and marketing cattle, regardless of the size of their operation or the value of their cattle, must pay the assessment."). For all these reasons, there is no reason to believe either that the Third and Tenth Circuits would sustain the assessment for mushrooms or that the Sixth Circuit would invalidate the assessment for beef (particularly

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[5] The free-riding problem is significant indeed. Among other things, to the extent the Council's generic advertising increases demand for fresh mushrooms, producers of principally processed mushrooms (which are exempt from the assessment, 7 U.S.C. § 6102(9)) can meet that increased demand by shifting their sales to the fresh market.

given that it has sustained the assessment for the similarly regulated milk industry, see *supra* at 14 n.3).[5]

There is, accordingly, no circuit conflict at all, much less one that would merit certiorari.

III. Petitioner's Remaining Arguments For Granting Certiorari Are Not Persuasive.

1. Petitioner also asserts that certiorari should be granted because the Sixth Circuit invalidated an Act of Congress. Pet. 8, 15. But Petitioner's argument misdescribes the breadth of the court of appeals' holding. This case involves the mandatory assessment for advertising and public relations campaigns, which is not intrinsically tied to promotion efforts since such programs need not be compulsory (and, in fact, generally were voluntary until the late 1980s, see *Frame*, 885 F.2d at 1122 n.1 (noting that wool promotion program did "not provide for mandatory assessments"); *id.* at 1147 n.2 (Sloviter, J., dissenting) (citing statutory provisions for cotton, watermelon, potatoes, and honey)). Indeed, notwithstanding the Sixth Circuit's decision, even the Council's promotion efforts can be continued through voluntary assessments, see 7 C.F.R. § 1209.50(d), which seems the likely result in light of Petitioner's view that the program is widely supported by other mushroom producers and importers, Pet. 4.

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[5] Viewed objectively, the government's actions make clear that it too views the beef assessment as valid under the Sixth Circuit's decision. Respondent has confirmed with the Solicitor General that the USDA continues to collect the beef assessment within the states that comprise the Sixth Circuit. The USDA can collect that assessment only if it believes that the judgment below, which became binding when the Sixth Circuit's mandate issued several months ago, is not dispositive as to the beef assessment. (Not surprisingly, as to the government's food promotion programs, the proof is in the pudding.)

Nor is there any substantial argument that the promotion program as a whole, much less the vitality of the assessment in the few states within the Sixth Circuit's jurisdiction, has larger consequences for the industry generally or was seriously regarded by Congress as an essential national endeavor. The government has derisively rejected the claim that a ruling by one circuit invalidating the mushroom program would have broader application, maintaining that "[t]he Secretary enjoys a national jurisdiction and is not constrained by law or policy to knee-jerk subservience to the dictates of any district or circuit court." C.A. App. 115-16. That is an important point because the decision below impacts an exceedingly small proportion of U.S. mushroom production, and therefore of mushroom assessments. U.S. Dep't of Agric., *Fruit and Vegetable Programs: Mushroom Promotion, Research, and Consumer Information Order* <<*www.ams.usda.gov/fv/rpmushroom.html*>> (visited Oct. 5, 2000) (reporting that Ohio and Michigan "each accounted for about 2 percent" of total U.S. production, in contrast to Pennsylvania (47%) and California (17%)). (There is only one substantial mushroom farm, producing approximately 15 to 20 million pounds of mushrooms annually [less than 2.5% of national production], in Tennessee. Respondent is not aware of any substantial mushroom farms in Kentucky, the fourth state within the Sixth Circuit.)[7]

The Mushroom Act itself, it must be stressed, does not mandate the use of paid promotions at all. Furthermore, either the Secretary of Agriculture or a majority of producers and importers can terminate the *entire* Mushroom Order at

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[7] The anomaly that United Foods is subject to the Sixth Circuit's decision notwithstanding that its mushroom production occurs in California, Oregon, and Utah arises because Petitioner brought this suit against United Foods in Tennessee apparently in order to avoid the force of the Ninth Circuit's then-binding decision in *Wileman*, which this Court only later reversed.

any time and for any reason without congressional approval. See 7 U.S.C. §§ 6105(b) (producer/importer referenda), 6110 (termination by Secretary). Thus, *no* Act of Congress was invalidated below – only an administrative order of potentially quite limited duration.

2. Petitioner also seriously overstates matters in arguing that the Sixth Circuit's decision "'threaten[s] the whole scheme'" of mushroom promotion because it will "encourage wider non-compliance.'" Pet. 13 (quoting *United States* v. *Ruzicka*, 329 U.S. 287, 293 (1946)). Respondent has confirmed with the Solicitor General that the government is not aware of a *single* producer that is not paying assessments based on the Sixth Circuit's decision. Furthermore, the Solicitor General advises Respondent that, so far as he is aware, the government is not presently litigating the constitutionality of *any* federal commodity assessment program at either the administrative or judicial level *anywhere* in the country.

Moreover, the decision on which Petitioner relies, *United States* v. *Ruzicka*, in reality rejects Petitioner's assertion that the failure to collect assessments from particular producers threatens the integrity of the commodity promotion programs. The language quoted by Petitioner reflects this Court's concern that challenges to assessments must be brought first in administrative proceedings rather than, as in that case, through a plenary action in federal court. This Court explained that Congress "avoided [the] hazards [of noncompliance] by the procedure it devised for the careful administrative and judicial consideration of a handler's grievance." 329 U.S. at 293. The same reasoning applies fully here, given that challenges to assessments under the Mushroom Act must be brought first in administrative proceedings and only later in court. See 7 U.S.C. § 6106. As *Ruzicka* explains, this orderly

framework for disposing of challenges to the Mushroom Order will avoid the "hazards" now hypothesized by Petitioner.[8]

3. Finally, it is worth noting three special considerations that make this case an inappropriate vehicle to resolve any broader questions or disagreements in the lower courts regarding the constitutionality of compelled advertising assessments. First and foremost, the parties developed essentially no record at all in the lower courts regarding the nature of the mushroom industry or the efficacy of the Mushroom Council's promotion program. United Foods' motion to adopt in this case the factual record from another proceeding was rejected by the administrative law judge based on Petitioner's objection. See *supra* at 5 (quoting Order Granting Motion To Stay Proceedings, No. 96-1252, *United States* v. *United Foods*, at 4 (W.D. Tenn. Feb. 11, 1997)); United Foods' Memorandum In Support Of Its Response To The Government's Motion To Dismiss, No. 96-1252, *United States* v. *United Foods*, at 7 (W.D. Tenn., filed July 9, 1998) ("The most important aspect of the history of this case is that the United States Department of Agriculture dismissed United Foods' administrative petition, ostensibly on purely legal grounds, without an evidentiary hearing.").

Second, the Mushroom Act presents the extreme example of a compelled promotion program for an entirely unregulated commodity. A decision in this case is accordingly unlikely to

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[8] Furthermore, any risk that other producers will cease paying assessments is a dilemma that results only from Petitioner's refusal to stipulate that producers whose challenges to assessments are eventually sustained will be entitled to reimbursement of payments they make in the interim. See Order Granting Motion To Stay Proceedings, No. 96-1252, *United States* v. *United Foods*, at 5 (W.D. Tenn. Feb. 11, 1997) ("The Secretary is delaying the progress of United Foods' administrative proceeding because it strongly suspects the ALJ's decision will be unfavorable, yet simultaneously seeks to pursue an enforcement action without even stipulating to a refund should United Foods ultimately prevail.").

shed light on the constitutionality of many other programs involving products that are substantially regulated such as those for beef and milk, which are also of far greater economic and social significance.

Third, this is one of the first cases under *any* compelled advertising scheme to make its way from the administrative level to a federal court of appeals in the wake of *Wileman*. Absent an urgent basis for granting review, which does not exist in this case, it would be more prudent to await additional rulings by the courts of appeals on various other assessment programs, which no doubt will shed light on the nature of the various markets and advertising programs administered by the federal government.[9]

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[9] The benefits of percolation are also apparent, for example, from the fact that even Petitioner cannot determine what rules have been adopted by the various circuits. Thus, the government argues here that the Ninth Circuit's decision sustaining the milk assessment in *Gallo Cattle Co.* v. *California Milk Advisory Board*, 185 F.3d 969 (1999), turns on the degree of industry regulation and therefore accords with the Sixth Circuit's decision in this case. See Pet. 12. This notwithstanding that the government read *Gallo* to support precisely the opposite proposition below. Govt's Pet. for Rhg. and Rhg. *En Banc*, No. 98-6436, *United Foods* v. *United States* 6 n.3, 10 n.7, 13 n.8; see also Rule 28(j) Letter Of The United States, No. 98-6436, *United Foods* v. *United States*, at 2 (dated Aug. 24, 1999).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Bradley A. MacLean
Farris, Warfield & Kanaday, PLC
Suntrust Center
424 Church St.
Suite 1800
Nashville, TN 37219-2376

Laurence H. Tribe
(Counsel of Record)
Hauser Hall 420
1575 Massachusetts Ave.
Cambridge, MA 02138
(617) 495-4621

Thomas C. Goldstein
Thomas C. Goldstein, P.C.
4607 Asbury Pl., N.W.
Washington, DC 20016

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